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IN THE

Supreme Court of the United States.

No. 549. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

LAURA A. WASHINGTON, COMPLAINANT, AND EDWARD W. WELLS AND RICHARD F. ENNIS, RECEIVERS OF TRUST FUND MORTGAGES AGGREGATING $2,901,236.07,

Appellees.

No. 550. October Term, 1934.

WILLIAM D. GORDON, SECRETARY OF BANKING, AND ROBERT G. FUNKHOUSER, SPECIAL DEPUTY AS AGENT IN POSSESSION OF CHESTER COUNTY TRUST COMPANY,

Appellants,

v.

MARY A. O'BRIEN, COMPLAINANT, AND JOHN HEMPHILL AND J. LOUIS BREITINGER, RECEIVERS OF TRUST MORTGAGES AGGREGATING $1,742,404.91,

Appellees.

BRIEF FOR PETITIONERS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

This case comes before the Court on Writ of Certiorari issued to review a final decree of the Circuit Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinions of the District Court and the Circuit Court of Appeals have not been reported.

STATUTES INVOLVED.

The Federal Statute involved in this proceeding, and referred to in the courts below, is Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A., Sec. 41 (1), and is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> "First. Of all suits of a civil nature at common law or in equity . . . where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and . . . is between citizens of different states."

The Pennsylvania statutes involved in this proceeding are the Act of June 18, 1923, P. L. 809, called the "Banking Act of 1923", and the Act of May 15, 1933, P. L. 565, called "The Department of Banking Code." The relevant sections of these Acts are set forth in the Appendix of this Brief, beginning at page 50.

The other Pennsylvania statute involved is Article 2 of the Administrative Code of 1929, Act of April 9, 1929, P. L. 177, quoted on page 34 of this brief.

The Section of the Constitution of the United States involved is the Eleventh Amendment, reading as follows:

> "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state."

JURISDICTION.

The rules of this Court have been complied with.

A statement as to jurisdiction is a part of the Brief in Support of the Petition for Certiorari, which was printed and filed with this court.

STATEMENT OF THE CASE.

These are appeals from the decrees of the Circuit Court of Appeals for the Third Circuit, affirming decrees of the District Court in the Eastern District of Pennsylvania.

These decrees at first appointed permanent receivers for two mortgage pools, of which the Chester County Trust Company, of Chester County, Pennsylvania, was Trustee, and of which institution the Secretary of Banking for the Commonwealth of Pennsylvania had already taken possession in his capacity of statutory receiver under the Banking Act of 1923, and the Department of Banking Code of 1933.

Motions were filed by the appellants to vacate the appointment of the receivers and to dismiss the Bills in Equity. The Order appointing the Receivers was then amended so as to make them temporary receivers. Subsequently, after argument the motions of the appellant to vacate the appointment of receivers and dismiss the bills were overruled by the District Court.

On appeals to the Circuit Court of Appeals for the Third Circuit, the decrees of the District Court were affirmed on September 28, 1934.

The appellants filed their petitions for writs of certiorari on November 28, 1934. The Answer opposing the allowance of the writs was filed by the appellees. The writs were granted on January 7, 1935.

On February 14, 1933, the Secretary of Banking of the Commonwealth of Pennsylvania took "possession of the business and property" of the Chester County Trust Company, located in West Chester, Chester County, Pennsylvania. The Secretary of Banking filed his certificate of possession at his office in Harrisburg, and on February 15, 1933, filed a certified copy of that certificate in the Office of the Prothonotary of Chester County, who indexed it on the Judgment Index (R. 46). All this was in accordance with the requirements of the Act of June 15, 1923, P. L. 809, and entitled: The Banking Act of 1923 (R. 137).

Included in the "business and property" of which the Secretary of Banking took possession, were two trust funds or mortgage pools consisting of mortgages held by the Trust Company as Trustee, and against which it had issued participation certificates. The face value of the pool in case No. 549 was $2,901,236.07 (R. 136), and the value of the pool in case No. 550 was $1,742,404.91 (R. 136).

The Secretary of Banking, in accordance with the Banking Act of 1923, was a receiver under the jurisdiction of the Court of Common Pleas of Chester County.

On July 3, 1933, the Act of May 15, 1933, P. L. 565, known as "The Department of Banking Code," became effective. That Code recites the duties of the Secretary of Banking as receiver of a bank or trust company of which he has taken possession, and provides in Section 701:

> "Except as otherwise provided in this Act, the Secretary when he has taken possession of the business and property of an institution, shall be responsible to the court in which the certificate of possession is filed and not to any other court."

Article IX of the Code set forth in full, at page 56 in the Appendix to this brief, particularly describes the duties

of the Secretary of Banking, and the rights of interested parties with respect to mortgage trust funds or pools.

The Secretary of Banking has conducted these mortgage pools from the time when he took possession of the Trust Company on February 14, 1933, to the present time.

On August 25, 1933, a Bill was filed in the District Court of the United States for the Eastern District of Pennsylvania, in behalf of LAURA A. WASHINGTON, a citizen of Connecticut, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in possession of Chester County Trust Company."

The Bill stated that the complainant owned a Forty Thousand Dollar interest in the mortgage trust fund of $2,901,236.01 (which interest was about one and four-tenths per cent. of the fund); and averred on information, advice and belief that "little effort is made to secure the collection of interest," that "little effort is being made to compel payment of taxes," and that unless a receiver is appointed "the interest on said mortgages will continue in default and the taxes on many of the properties will continue to remain unpaid to the detriment and irreparable damage of the complainant and others holding like certificates."

There was no charge of improper conduct or mismanagement. The Bill *inter alia* prayed for the appointment of a receiver or receivers "to take charge of, conserve and administer" the pool; for an order on the respondents to turn over all the assets and records of the pool to the receivers; and for authority to the receivers to collect mortgage interest, to demand the payment of taxes, and to bring suit for the collection of the principal of the mortgages; and further prayed for an order restraining all interference with the receivers so appointed (R. 9). The subpœna was returnable September 14, 1933 (R. 1).

On August 28, 1933 a Bill in behalf of Mary A. O'Brien, a citizen of New Jersey, naming as defendants "William D. Gordon, Secretary of Banking, and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company," was filed in the District Court of the United States for the Eastern District of Pennsylvania. The Bill was identical with that filed on behalf of Laura A. Washington, except that the Bill filed on behalf of Mary A. O'Brien was with respect to an interest of Thirty-seven Hundred Dollars (about one-fifth of one per cent.) in a mortgage pool aggregating $1,742,404.91 (R. 9). The subpœna was returnable September 18, 1933 (R. 6).

On August 28, 1933, attorneys for the complainants in both cases filed motions for the appointment of receivers (R. 6).

On August 30, 1933, before an appearance had been entered by counsel on behalf of respondents, Judge Welsh, after only one hour's telephone notice to counsel for respondents, by counsel for the complainants, held a hearing upon the motions. Counsel for the respondents appeared and argued the case and at the close of his argument requested an opportunity to file a brief. The court stated that a brief was not necessary. On the same day, within a few hours after the termination of the argument, without awaiting the filing of an Answer; without taking testimony; without any notice to those interested in the trust funds, and upon the bare averments of the Bills, the court appointed two receivers for the assets of each mortgage pool (R. 49). The Order directed the receivers "to hold and preserve" all the assets, and to "make quarterly reports to this court." The Order authorized the receivers to conduct and manage the mortgage pools; to collect principal and interest by suit or otherwise; to employ agents

and to pay out money for the preservation of the assets (R. 15).

On September 1, 1933, without prior notice or demand, the receivers for the respective mortgage pools, appeared at the Trust Company and demanded possession of all the assets and records of the respective mortgage pools. This possession was refused by two subordinates then on duty (R. 49).

On September 2, 1933, the Saturday before Labor Day, the court upon petition of its receivers, allowed a rule to show cause why the Secretary of Banking and his Deputy Agent, and their subordinates should not be adjudged in contempt (R. 24).

On September 4, 1933, the Court of Common Pleas of Chester County, upon application by a mortgage trust fund certificate-holder, issued an injunction restraining the appellants from relinquishing possession of the mortgage pool assets, pending further Order of the Court of Common Pleas of Chester County (R. 32), and this injunction was served upon the Deputy Receiver (R. 31).

On September 5, 1933, the persons named in the contempt proceedings appeared before the court and at that time there was presented and filed an Answer to the contempt petition (R. 29), a motion to dismiss the bills (R. 43), and a petition to vacate the appointment of the receivers (R. 46). No further action has been taken in the contempt proceedings.

Upon the day set for a hearing upon the motion to dismiss a petition to vacate the appointment of receivers, September 22, 1933, the court of its own motion entered a decree amending its form of decree so as to make the appointees "temporary receivers" (R. 55) and caused the original decree to be altered by inserting the word "temporary" with pen and ink throughout (R. 15).

A decree dismissing the prayer to vacate and overruling the motion to dismiss was entered by the court after the filing of an opinion (R. 66) on October 4, 1933. The court refused to allow an appeal and a supersedeas (R. 76) both of which were allowed by the Circuit Court of Appeals for the Third Circuit (R. 87).

On January 4, 1934 argument on the appeal was heard by the Circuit Court, at which time the owners of $326,250.00 of certificates in the mortgage pool in the O'Brien case (R. 122), and owners of $1,716,684.70 of certificates in the mortgage pool in the Washington case (R. 103), filed petitions for leave to intervene, stating their active opposition to Federal receivership. No other certificate-holders have been made parties to these proceedings or have appeared in it.

On September 28, 1934, the Circuit Court of Appeals filed an opinion (R. 136) and entered an Order (R. 149) affirming the decrees of the District Court.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in that it affirmed the decrees of the District Court for the Eastern District of Pennsylvania, appointing receivers for the mortgage trust fund or pool, changing the designation of receivers to "temporary" receivers, dismissing the petition to vacate the appointment of receivers, and overruling the motion to dismiss the bill in the proceedings entitled "Mary A. O'Brien v. William D. Gordon, Secretary of Banking and Robert G. Funkhouser, Special Deputy as Agent in Possession of Chester County Trust Company, No. 7849, June Term, 1933," and the bill in the proceedings entitled "Laura A. Washington v. William D. Gordon, Secretary of Banking and Robert G. Funkhouser,

Special Deputy as Agent in Possession of Chester County Trust Company, No. 7485, June Term, 1933."

2. The Circuit Court of Appeals for the Third Circuit erred in entering the following order on September 28, 1934:

> "This cause came on to be heard on the transcript of the record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.
>
> "On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decrees of the said District Court in this cause be, and the same are hereby affirmed, with costs." (R. 149)

QUESTIONS INVOLVED.

1. Is a bill in equity naming the Secretary of Banking for the Commonwealth of Pennsylvania, a defendant, and which has for its purpose the substitution for the Secretary of Banking as state receiver, federal receivers, a suit against the State of Pennsylvania and contrary to the Eleventh Amendment of the United States Constitution?

2. Is the Secretary of Banking, when sued in his official capacity as a Receiver of a closed state bank, a citizen of the state within the meaning of Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A., Sec. 41 (1)?

3. Assuming that the United States District Court had jurisdiction to appoint receivers to supplant the Secretary of Banking for the State of Pennsylvania, Receiver, was not their appointment in these cases a gross abuse of that discretion?

ARGUMENT.

SUMMARY.

Pennsylvania System is Complete. The Pennsylvania statutes provide a complete system for the liquidation of all the "business and property" of a closed trust company. The Secretary of Banking is directed to take possession of the trust company, to file a certificate of possession in his own office and to file a copy of it with the court of common pleas of the county where the trust company is located. The statute provides that the Secretary shall then be the receiver of the trust company and shall be responsible to "the court in which the certificate of possession is filed and not to any other court".

The statute specifically provides for mortgage trust funds or pools which come into the hands of the Secretary of Banking as receiver of a trust company. The Secretary is required to file an account and to deliver the assets to a trustee appointed by the court of common pleas. The petition for the appointment of a trustee is to be filed in the court of common pleas where the certificate of possession was filed by any mortgage certificate holder, or it may be filed by the Secretary himself if no certificate holder has acted *within thirty days after the notice by the Secretary of the filing of his account.*

State Already Had Possession and Control. In the present cases the Secretary filed his certificates of possession, took physical possession of the mortgage trust funds and managed the funds for over six months before the filing of the bills in the District Court. The funds were in the possession and control of the Commonwealth of Pennsyl-

vania, by its designated officer who was subject to the jurisdiction of its court.

State Receivership Must be Respected. It has been repeatedly decided that a Federal court cannot appoint a receiver to wrest the possession of assets from a receiver already appointed by a state court. It makes no difference whether the state receiver is a "statutory receiver" or a receiver appointed in pursuance of a bill in equity. In either case, the state receiver derives his authority from the state law and the Federal district courts must respect that authority. A contrary decision by this Court will lead to inextricable confusion in the liquidation of closed banks and trust companies.

No Decree of State Court Necessary. Even if the Federal courts will respect state receivers only if they are the creatures of state courts, the Secretary of Banking of Pennsylvania in this case is a receiver of the state court. The state may give its courts jurisdiction in any way it sees fit. A bill in equity is not a prerequisite. A state may provide, as Pennsylvania has provided, that its administrative officer shall become a receiver under the control of the court as soon as he files with the court his certificate showing that he has taken possession of a trust company. To say that a further decree of the court is necessary to establish its jurisdiction over the Secretary of Banking, is to require of the court an act of supererogation which can add nothing to the express statutory provision giving the court jurisdiction as soon as the Secretary of Banking files his certificate of possession. Though the decision of the Circuit Court of Appeals in this matter is stated as applicable only to the present case, the principle would apply equally to all the assets of a closed bank or trust company and would make the entry

of a formal decree necessary in every case to avoid the danger of Federal receiverships.

Violation of Eleventh Amendment. The Commonwealth of Pennsylvania having acquired through its officers and its courts, complete possession and control of the mortgage trust fund, a suit against its officers to take away that possession and that control is a suit against the Commonwealth of Pennsylvania. The Eleventh Amendment to the Constitution of the United States provides that the judicial power of the United States shall not extend to such a suit.

Lack of Diversity of Citizenship. A suit against state administrative officers in their official capacities is a suit against the state, and in the absence of any constitutional question the court has no jurisdiction because there is no diversity of citizenship within the meaning of Section 24 of the Judicial Code as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091; 28 U. S. C. A., Section 41 (1).

Abuse of Discretion. The District Court abused its discretion in appointing receivers.

The bill in equity stated no complaint except that "little effort is made" to secure the payment of mortgage interest and that "little effort is made" to compel the payment of taxes, followed by the conclusion that unless receivers are appointed the interest and the taxes will remain unpaid and the certificate holders will be irreparably damaged.

A "hearing" on the bill was had the day after it was served, and with no opportunity to counsel to prepare a brief or properly to consider the case. No answer was filed and no testimony was taken. On the same day trustees of the pool were appointed in the guise of receivers. No certificate holder, except the complainant in No. 550 who owned one-fifth of 1 per cent. of the fund in her pool, and the com-

plainant in No. 549 who owned 1 4/10 per cent. of the fund in her pool, had notice of the proceedings. It was attempted to enforce the decree appointing receivers by contempt proceedings against the subordinates of the Secretary of Banking in charge of the trust fund. When the district judge dismissed the petitions to vacate the orders appointing receivers and overruled the motion to dismiss the bill, the court refused to allow an appeal with a supersedeas and it was necessary to apply to the Circuit Court of Appeals. The holders of a large proportion of the funds have shown, by their petitions to the circuit court for leave to intervene, that they object strongly to a Federal receivership.

Aside from any question of jurisdiction, the district court abused its discretion and should have dismissed the bills and relegated the complainants to the complete remedy afforded them by the state law which provides for the appointment of substituted trustees after notice to all parties in pursuance of orderly procedure.

I. It Was an Abuse of Discretion for the Federal Court for the Eastern District of Pennsylvania to Appoint the Receivers in This Case.

It may be stated as a broad proposition that the Federal Court, in the exercise of its general equity jurisdiction, does have the power to appoint receivers for property within its jurisdiction. This power has often been stated to be a discretionary one. Granting the truth of this, it must also be recognized that the discretion to be exercised is not as broad as individual conscience, but is limited by the confines of many decisions.

It is pertinent to observe the remarks of Chief Justice Marshall in OSBORNE v. UNITED STATES BANK, 9 Wheaton 738 (1824) at page 866, where he stated:

"Judicial power as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court, to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law."

As Section 7669 of Fletcher's Cyclopedia of Corporations expresses it:

"The distinction between 'jurisdiction' to appoint a receiver and whether the power, if it exists, shall be exercised, must always be kept in mind. Jurisdiction of a court of equity to appoint a receiver is one thing, and whether the court will exercise its jurisdiction is an entirely different matter. While courts hesitate to appoint a receiver, especially when the corporation is solvent, this does not mean that there is want of jurisdiction to appoint a receiver, it being well said that 'judicial hesitancy does not mean judicial atrophy or paralysis.'"

And again in Section 7697:

". . . The power of appointment [*of receivers*] is a delicate one, and to be exercised with great circumspection. Indeed, the courts have held repeatedly that the power to appoint a receiver should be exercised with great care and the utmost caution and only in case of an emergency . . . or . . . 'extreme necessity,' . . . and more especially is this true where the corporation is solvent, or the defendant corporation is a bank. . . . 'A receivership is not a panacea

for all business ills. The remedy may be worse than the disease.' . . . 'A receivership is the most drastic remedy and the most expensive luxury known to the realm of the law.' . . ." Citing Furrer v. Nebraska Building and Investment Company, 189 N. W. 359 (Neb.).

This language applies with particular force to banking institutions. This is especially so in view of the fact that the legislatures of many states have enacted laws giving to statutory officers the duty to liquidate these institutions under the supervision of the local courts. The legislatures evidently had in mind the avoidance of the well-known abuses which have become so costly to creditors and stockholders in receiverships of ordinary corporations.

In his article on "The Abuses of Receiverships," in XIX Yale Law Journal 275 (1910), Judge Jacob Trieber of the United States District Court in Arkansas, said:

"The appointment of a receiver and the granting of a temporary injunction, like the granting of specific performance of contracts, is not a matter of absolute right, but is within the sound discretion of the court, guided by the established principles, rules and practices in equity. One of the well-established rules is that courts of equity will not grant any interlocutory relief if the injury caused the defendants by reason thereof will prove very great, while the benefits to the party applying therefor will be but small compared with the injury inflicted upon the defendant. Still, in spite of these well-settled equitable principles, it is not unusual for appointments of receivers to be made upon the most flimsy allegations, and sometimes even without notice to the parties directly affected thereby: . . ."

Experience shows this to be true.

There is a real and extensive public interest involved in the state supervision and regulation of banks. Judges should hesitate a long while before applying to such institutions the extraordinary remedy of receivership.

A. In the Absence of Clear Proof of Maladministration, Corruption or Fraud, a Federal Court Should Not Disturb an Administrative State Agency in Its Possession of the Assets of a Quasi-Public Institution.

The Legislature of the Commonwealth of Pennsylvania has provided a complete Code of Laws relating to the organization, administration and liquidation of all types of quasi-public institutions. In the Pennsylvania Banking Act of 1923, Act of June 15, 1923, P. L. 809, as amended by the Act of May 5, 1927, P. L. 762, and as superseded by the Department of Banking Code of 1933, Act of May 15, 1933, P. L. 565, provisions are made for the liquidation of the business and property of banks and trust companies within the Commonwealth.

It cannot be questioned that the Secretary of Banking, in taking possession of the banking institution, either under the Banking Act of 1923 or as a "receiver" under the Act of 1933, took possession of the mortgage pools. (Act of May 15, 1923, P. L. 809, Section 4; Act of May 15, 1933, Section 901 *et seq.*, Appendix page 56).

The Act of 1923 and Section 801 of 1933 provide that, in taking possession of the business and property of any banking institution, the Department and the Secretary of Banking shall likewise take possession of all the funds or property held by the bank in any fiduciary capacity. In addition to this, Article IX, Sections 901 *et seq.*, of the Department of Banking Code of 1933 specifically provides, with reference to mortgage pools, that the Secretary shall

file an account with the Court of Common Pleas "as soon as it may be convenient", giving notice to all the beneficial owners; that he may deliver the assets to the beneficial owners, if they are sui juris; that any owner may at any time apply to the Court of Common Pleas of the county in which the certificate of possession is filed to appoint a substituted trustee; and that the Secretary shall so apply, if no owner has done so, within thirty days after the filing of the account; that the Court shall conduct a hearing before appointing a trustee; and the Court may allow compensation for the services of the trust company and of the Secretary.

From these provisions it is plain that the Commonwealth takes entire control of a mortgage trust fund from the moment the receivership begins until the assets have been delivered either to all the beneficial owners or to a new trustee appointed by the Court of Common Pleas.

Other than in a few recent cases in the Third Circuit, it was generally recognized that a Federal Court would not interfere with the state administrative control of quasi-public corporations.

Significant Cases.

In O'NEILL v. WELCH, 245 Fed. 261 (C. C. A. 3, 1913), which, ostensibly, rests upon the priority of State Court jurisdiction, it was expressly recognized that the administration of an insurance company in accordance with State Statutes was paramount to the power of the Federal Court. In that case, Judge Woolley stated, at page 268:

"... When, therefore, the statutory proceeding has been begun in a State court and by its commencement jurisdiction has been acquired over the corporation, neither the corporation nor its stockholders, nor its creditors can divest the court of its jurisdiction

or deprive the State of its public function by subsequently invoking the aid of a Federal court to remove the corporation's property beyond the reach of the State court and thereby withdraw from the State court the subject matter of the action there pending. *If this were not so, every action instituted by the State government against an insurance company might be interrupted and defeated by a non-resident stockholder filing in a Federal court a bill accompanied with the answer of an acquiescing corporation, after action has been begun in the State Court and before in its orderly progress the property of the corporation has been physically seized. Thus the policy of the State would be thwarted and its administration overthrown; the State's creature would be more powerful than the State itself. We are satisfied that no such thing was contemplated either in Federal or State policy.*" (Italics supplied.)

In LYON v. MCKEEFREY, 171 Fed. 381 (C. C. A. 3, 1909), in upholding the right of a state banking official to compel Federal receivers to turn over the assets of a state bank to him, Judge Gray said, at page 392:

"The defendant corporation was a creature of the laws of Pennsylvania, and by those laws the rules governing its existence were prescribed. The measure of control to be exercised over its own corporations was determinable by the law and policy of the state to which they owed their being. By the legislation here in question, the State of Pennsylvania has seen fit to subject such corporations to supervision and administrative control and has ordained the proceedings, partly administrative and partly judicial, by which the life of such corporations may be determined and their affairs wound up and liquidated. The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the State, acting on behalf of the Commonwealth and in the interest of the public. Such

a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

In MITCHELL v. LAY, 48 F. (2d) 79, (C. C. A. 9, 1930) (Certiorari denied 283 U. S. 864, 75 L. Ed. 1469 [1931]), the Court recognized the supremacy of the Statute Law of California, which established a procedure for the liquidation of insurance companies.

The Circuit Court of Appeals for the Fifth Circuit has likewise recognized a Federal Court should not appoint a receiver to liquidate a bank in a case where the Laws of the State provide for a complete method of liquidation.

BANK OF BAY BISCAYNE, ET AL. v. HANKINS, ET AL., 42 F. (2d) 209 (C. C. A. 5, 1930).

Using equally forceful language, the State Courts have repeatedly upheld the systems established by State Law to supervise and liquidate banks and other quasi-public institutions.

ABBOTT, COM. OF BANKING, v. MORRIS, Judge, 132 S. E. 372 (S. C. A. W. Va. 1926).

GREEN, SUPERINTENDENT OF BANKS, v. SMITH, ET AL., 129 So. 92 (S. Ct. Fla. 1930).

STATE OF FLORIDA, EX. REL., DADE COUNTY SECURITY CO., ET. AL., v. BARNS, ET. AL., 128 So. 860 (S. Ct. Fla. 1930).

STATE OF FLORIDA, EX REL., LANDIS, ATTY. GEN. v. CIRCUIT FOR ELEVENTH JUDICIAL CIRCUIT, ET. AL., 135 So. 866 (S. Ct. Fla., 1931).

STATE OF FLORIDA, EX. REL., PORTER, ET. AL., v. ATKINSON, CIRCUIT JUDGE, ET. AL., 146 So. 51 (S. Ct. Fla., 1933).

STATE OF MISSOURI, EX. REL., MISSOURI STATE LIFE INS. CO. v. HALL, JUDGE, ET. AL., 52 S. W. (2d) 174 (S. Ct. Mo., 1932).

STATE OF OHIO, EX. REL., BETTMAN v. COURT OF COMMON PLEAS OF FRANKLIN COUNTY, 178 N. E. 258 (S. Ct. Ohio, 1931).

UNION SAVINGS AND INVESTMENT CO. v. DISTRICT COURT OF SALT LAKE COUNTY, 140 Pac. 221 (S. Ct. Utah, 1914).

That the system for the liquidation of banks through an administrative agency of the Government is an exclusive one was also recognized by the Federal Court in PORT NEWARK NATIONAL BANK OF NEWARK v. WALDRON, 46 F. (2d) 296, (C. C. A. 3, 1930). There the "dominion" of the Comptroller of the Currency was sustained against the claim of a receiver appointed by the United States Court.

In a case virtually identical with the cases here presented, that for which the Commonwealth contends was upheld. In AMOS, COMPTROLLER OF STATE OF FLORIDA, v. TRUST COMPANY OF FLORIDA, ET. AL., 54 F. (2d) 286 (C. C. A. 5, 1931), the District Court attempted to assume jurisdiction over a series of trusts, operated by the Trust Company of Florida. The Comptroller, a State Administrative Officer akin to the Secretary of Banking of the Commonwealth, intervened, appointed a liquidator under the Florida Statute, and then moved to dissolve the receivership. The District Court, which denied the Comptroller his claim, was reversed by the Circuit Court of Appeals, which stated, by Judge Sibley, at page 289:

> "We need not inquire whether the equity jurisdiction of a federal court may be thus curtailed by state law, because in this case a general receivership for the Trust Company of Florida was denied, and particular

relief only was granted touching certain trusts. We need only inquire whether under general principles of equity the relief granted was proper. In the unforeclosed trust mortgages, the Trust Company of Florida had a title in trust, with a contract right under which fees might be earned. In those which had been foreclosed it held title in fee, but subject to equitable rights in the several bondholders. In all cases it claims to have made advances in the line of its duties as trustee and to preserve the property for which it has a lien thereon, totaling over $400,000, more than twice its capital stock. The safety of this investment and the solvency of the company depend on the management and eventual disposition of the trust properties. The handling of these two hundred trusts is the major part of the business of the company. It is plain that the trusts are in a very substantial sense property and business of the Trust Company which the comptroller may seize and liquidate under the law. *The comptroller and his liquidator are competent to execute trusts like those here involved; they being within the powers of the corporation to be liquidated.* Power v. Chillingworth, 93 Fla. 1030, 113 So. 280. Even if the corporation placed in liquidation has been an unfaithful trustee, no presumption can be indulged that the state officials will not be careful, efficient, and economical. A proper respect and deference on the part of the federal agencies of government toward those of the state compels that assumption. It is said in Knott v. Morris (Fla.) 134 So. 615, that *fraud, corruption, maladministration or other illegality in the liquidation must be established to justify court interference. No such thing here appearing, the court correctly refused to take over the liquidation of the Trust Company of Florida by a general receivership, but improperly took over a large part of its assets and affairs by the special receivership and by enjoining the comptroller from exercising his functions in reference thereto.*" (Italics supplied.)

In his decision Judge Sibley followed the prior decision of that Circuit in BANK OF BAY BISCAYNE, ET. AL., v. HANKINS (supra).

A petition for Writ of Certiorari was denied by this Court. (285 U. S. 559, 76 L. Ed. 947, 1932.)

Clearly the Secretary of Banking had a right to administer all the assets of the Chester County Trust Company, including trust property within the limitation of his statutory authority, free from any interference by a Federal Court, except in cases of gross mismanagement or fraud, of which no evidence was adduced in these cases.

Further, it is argued by the Appellees that whatever comity exists, exists between the Federal and the State Courts as courts, and not between the Federal Court and the State as sovereign. Such an argument seems to us to be trying to pull a camel through the eye of a needle. The State Court must look for the source of all powers in two places.

(1) The Statutory Laws of the State; and

(2) The Common Law in its legal and equitable applications.

In fact, the Statutory Law of the State may be said to arise from the experiences and *mores* of the people of the State. The State stands in relation to the Court as *pater curiæ;* the common law being *mater curiæ.* Therefore, when the State has first taken jurisdiction the comity which extends between State Court and Federal Court should extend between the Federal Court and the State. The logic of the situation implies that the sources of all power receive the same consideration as any particular manifestation of that power.

B. Under the Laws of the Commonwealth of Pennsylvania, Jurisdiction Over the Distribution and Control of the Mortgage Pool Assets Was in the Court of Common Pleas of Chester County.

Neither the District Court nor the Circuit Court denied that if the State Court had here acquired jurisdiction, the subsequent assumption of jurisdiction by the Federal Court should have been denied. It is, however, contended that no jurisdiction over the *res* had been acquired by the Court.

When the Secretary of Banking took possession, he did so under the provisions of Sections 21, *et seq.*, of the Banking Code of 1923, as amended by the Act of May 5, 1927, P. L. 762. This Act provided that when the Secretary takes possession, he shall file a certificate to that effect in the office of the Prothonotary (Section 22, Appendix page 50); within ten days thereafter the institution may apply to the Court in which the certificate of possession is filed to enjoin the Secretary of Banking from continuing in possession (Section 23, Appendix page 50); that the Secretary shall have all the rights, powers *and duties* of a receiver appointed by any Court of Equity (Section 29, Appendix page 50); and that the Court having jurisdiction shall have the power to make and enforce any and all orders necessary and appropriate to enable the Secretary to discharge his duties (Section 30).

Even if for a moment we fail to consider the plain language of the Act of 1933, it would seem under the Act of 1923, as amended, that the Court in which the certificate of possession was filed, did thereby acquire jurisdiction.

It is hardly conceivable that there is any distinction between the equity-appointed receiver and the statutory-designated receiver under the Act of 1923. In either case

the receiver is subject to the control of the appointing or designated court. In either case the receiver's accounts are audited, in either the appointing or designated court; and, as a necessary incident thereto, the receiver is subject to sur-charge in either the appointing or designated court. The only distinction between the two cases is that in one case the appointment is upon petition to the Court and, in the other, the status acquired by legislative fiat is subjected to a designated court.

The mechanism differs but slightly from that set up in the Act of May 13, 1876, P. L. 161, or in the Act of February 11, 1895, P. L. 4. Under either Act the Court appointed "receivers" upon the application of the Auditor General (the predecessor of the Secretary of Banking), and the corporation for which the receiver had been appointed could apply to the Court for the purpose of enjoining the proceedings instituted by the Auditor General.

The obvious intent of the Act of 1923 was to do just what was done by these prior Acts, save that a speedier method of conferring jurisdiction upon the courts was evolved. It is submitted that a Legislature, in any manner it sees fit, may confer jurisdiction upon its courts.

If there was any doubt as to the nature of the jurisdiction of the Court of Common Pleas, this would seem to have been settled by the Act of May 15, 1933, P. L. 565. It is there provided (Section 601, Appendix page 52):

> "Whenever the Department takes possession of the business and property of an institution, the Secretary shall *by operation of law* simultaneously take over such possession from the Department and become receiver of such institution, subject to the provisions of this Act. His official title . . . shall be receiver of such institution". (Italics supplied.)

Under the Act, the Secretary is required to file a certificate of possession with the office of the Prothonotary (Section 604, Appendix page 52); and the institution involved may, within ten days apply to the Court for an order requiring the Secretary to show cause why he should not be enjoined from continuing as receiver (Section 605, Appendix page 53).

The Act further provides that suits against the Secretary as Receiver shall be instituted only in the Court in which the certificate of possession is filed; that with *leave of Court,* the Secretary may surrender burdensome assets, pay off mortgages, sell real property and enter into long-term leases.

It is significant to note that the definitive section of this Code defines "court" as the court in which the certificate of possession is filed, and "prothonotary" as the Prothonotary of *that* court.

In no clearer language could the Legislature have stated that the Secretary was subject to the Court in which he filed his certificate of possession.

The Courts are in accord upon the proposition that if the Secretary of Banking, in accordance with statute, had proceeded to have himself appointed receiver by a court of equity, such facts would have constituted an effective bar to the assumption of jurisdiction by the Federal Court, even though the statute under which he had proceeded provided that his duties should be identical with those imposed upon him by the Act of 1933, and even though the Act prescribed no greater measure of allegiance to any court.

In JACOBY v. BOND AND MORTGAGE GUARANTY COMPANY, 72 F. (2d) 420 (C. C. A. 2d, 1934), the Superintendent of Insurance of the State of New York, acting in accordance

with statutory authority, applied to the New York Court, and, under its order, took possession of the company's assets. It was held that a Federal Court erred in appointing trustees of the fund and enjoining the Superintendent of Insurance from interfering with the trustees to appointed.

A Writ of Certiorari was denied by this Court on December 3, 1934, 55 Sup. Ct. 216.

MITCHELL v. LAY, 48 F. (2d) 79 (C. C. A. 9, 1930) and AMOS v. TRUST COMPANY OF FLORIDA, 54 F. (2d) 286 (C. C. A. 5, 1931), both of which have been discussed, are cases in which a Federal receiver was even forced to retreat in favor of a subsequently court-appointed State officer appointed under statutory authority and direction.

If it be argued that the Court acquires no jurisdiction except as particular matters are brought before it, we might analogize the present case to the famous HARKINS v. BRUNDAGE, 276 U. S. 36, 72 L. Ed. 457 (1928). The filing of the certificate of possession in the instant case is analogous to the mere filing of the bills in HARKINS v. BRUNDAGE. In neither case does the Court have actual knowledge of the proceedings from the mere fact of filing, and yet in HARKINS v. BRUNDAGE it was stated and held, at page 43:

> "As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction and *constructive* possession of property *by the filing of the bill* is entitled to retain it without interference and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute."

Thus, even if actual possession of the property of the trust company, including the mortgage pools, had not been acquired by the Court upon the mere filing of the certificate

of possession, we submit that such a filing was analogous to the filing of the bill in HARKINS v. BRUNDAGE, and that in issuing its order, enjoining the Secretary of Banking from turning over any of the assets of the trust company, the Common Pleas Court of Chester County took cognizance of the certificate.

Further, under the doctrines enunciated in MITCHELL v. LAY and AMOS v. TRUST COMPANY OF FLORIDA (both supra) the Federal Court should have relinquished any prior assumption of jurisdiction, at least, at the time when the State Court took cognizance of the statutory dictates and ordered the Secretary to refrain from relinquishing possession.

C. A RECEIVERSHIP IS NEVER AN END IN ITSELF; AND THE PETITIONERS HAVE FAILED TO PROVE FACTS SHOWING THE NECESSITY OF APPOINTMENT OF RECEIVERS.

In PUSEY v. JONES, 261 U. S. 491 (1922), Mr. Justice Brandeis said, at page 497:

> "Whether the debtor be an individual or a corporation, the appointment of a receiver is merely an ancillary and incidental remedy. A receivership is not final relief. The appointment determines no substantive right, nor is it a step in the determination of such a right. It is a means of preserving property which may ultimately be applied toward the satisfaction of substantive rights."

In HOME MORTGAGE CO. ET AL. v. RAMSEY, 49 F. (2d) 738 (C. C. A. 4, 1931), reference is made to that authority, and the above citation from the opinion of the Supreme Court in the PUSEY v. JONES case is quoted and the rule is laid down as follows, at page 743:

> "Moreover, *the proposition is well settled that a federal court has no jurisdiction to entertain a suit for*

the appointment of a receiver where the receivership is sought as an end in itself. A receivership is essentially a temporary remedy to protect and conserve the property involved during the pendency of the principal action. Pusey & Jones v. Hanseen, 261 U. S. 491, 497, 43 S. Ct. 454, 67 L. Ed. 763; Brictson Mfg. Co. v. Close (C. C. A. 8th) 280 F. 297; Willeon v. Waltham Watch Co. (D. C. O.) 293 F. 811; Zuber v. Micmac Gold Mining Co. (C. C.) 180 F. 625; 23 R. C. L. 11; High on Receivers, Sec. 6." (Italics supplied.)

The bills in the instant case pray for no ultimate relief. They are definitely bills for the appointment of the receivers and nothing else. No substantial relief, to which a receivership might be incidental, is contemplated. In fact, the prayers of the bills of complaint (Paragraph 14, Record 11 et seq.) imply that receivers shall indefinitely continue to operate the pools and the Order appointing the receivers (R. 15). contemplates nothing more than the appointment of substituted trustees in the guise of receivers.

In HOME MORTGAGE CO. v. RAMSEY, *supra,* the Court denied the right of a Federal Court to appoint a receiver where a bondholder of the mortgage company averred its insolvency and prayed for the appointment of a receiver to take over all the property of the company and to administer it under the order of the Court. The Court stated that the prayer for receivership was not in contemplation of ultimate relief, in that the effort of the petitioners was to cause the displacement of a trustee.

In the instant case the District Court admits in its opinion (R. 66, 67):

> "After argument and *upon consideration of the averments* of complainant's bill, the Court granted complainant's motion for the appointment of a receiver" . . .

Thus the Court admits that the appointment of the receivers was solely upon the bare averments of the bill. These averments were all made upon information and belief and were to the effect that little effort was being made to compel the payment of interest and taxes, and that the certificate holders will suffer irreparable damage if receivers are not appointed.

The Judge of the District Court in his opinion states that the prayer of the bill and the motion of the complainants are for the appointment of a receiver pending hearing on the bill and answer. Examination of both the petition (R. 9) and the motion for the appointment of a receiver (R. 14) fail to indicate an intention that only temporary receivers are to be appointed. In fact, the very form of the decrees show that permanent positions were intended for the appointees, who were given powers appropriate to permanent receivers and were required to make quarterly reports to the Court. The Court even went so far as to appoint the receivers more than two weeks before the time fixed for the filing of an answer to the bill and the return day of the subpœna.

In answer to the Court's statement that it had only intended to appoint temporary receivers, it is significant to call attention to the fact that the decree was not amended so as to make the receivers temporary until the very day of the argument upon the motion to dismiss the bill and vacate the appointment of the receivers. Under these circumstances, and under the form of the original decree, how could the defendants have had an opportunity to file an answer before the rendition of an "apparently" final decree.

Nor was there in this case any showing of necessity that receivers be appointed. In HOME MORTGAGE CO. v. RAMSEY,

49 F. (2d) 738 (C. C. A. 4, 1931), the Court stated at page 742:

> "The appointment of receivers is to be resorted to only in cases of necessity and when no other remedy is available."

In MITCHELL v. LAY, 48 F. (2d) 79 (C. C. A. 9, 1930) the Court stated, at page 83:

> "It would seem clear that before the plaintiff was justified in coming into a court of equity for the appointment of a receiver and the liquidation of the affairs of the insurance company, she should have exhausted her remedy against this special fund deposited for her benefit. Whether upon the ground of diversity of citizenship and in default of any judicial proceeding in the State Courts, a Federal Court of Equity might enforce the rights of a non-resident to such fund or take jurisdiction thereof, is a question not involved in this case, for there is no claim that there has been any default or misconduct on the part of anyone with reference to the deposit in question. The *plaintiff has not attempted to secure any part of said fund by any of the methods provided by law and, therefore, is not in a position to invoke a court of equity to enforce rights which she herself has not undertaken to secure according to the procedure outlined by the State Law.*" (Italics supplied.)

The Legislature of the Commonwealth of Pennsylvania has provided a complete code, regulating and defining the rights of participants in mortgage pools. In the same way that the complainant in MITCHELL v. LAY, *supra*, failed to show that she had sought the res in the manner defined by State Law, so here it does not appear anywhere upon the record that the complainants sought a substituted fiduciary in the manner provided therefor in Article IX of the Department of Banking Code of 1933.

The many decisions under the Bankruptcy Act, which provides for appointment of receivers "*in case the Court shall find it absolutely necessary for the preservation of assets*", (Section 2, Clause 3 of Bankruptcy Act), are analogous to the instant case.

A ruling case is IN RE: E. H. WALSH, INC., 295 Fed. 504 (1923). There the Circuit Court of Appeals for the Second Circuit reversed the order of the District Court appointing receivers for a corporation of which receivers had been appointed by the State Court prior to the filing of a petition in bankruptcy. The court held that there could be no absolute necessity for the appointment of receivers under the circumstances of that case. Upon review the order of the District Court was reversed. In the opinion Judge Rogers said, after quoting Clause 3 of Section 2 of the Act above cited:

> "The court's jurisdiction to appoint receivers under the statute is thus confined to cases where the court 'shall *find it absolutely necessary for* the preservation of estates'. In the case of In re Spalding, which came before this court in May, 1905, and which has not been reported, this court said:
>
> > 'The fundamental error in the argument for the receiver and of the learned court below seems to be that both regard it as proper that a receiver should be appointed, practically as a matter of course, in every case where a petition in bankruptcy is filed. *That is not the law and it is not good sense.* The court has jurisdiction under the statute to appoint receivers only when it shall find it absolutely necessary for the preservation of estates. *The petition* upon which this receivership was granted not only fails to show that it was absolutely necessary, but *shows affirmatively that it was absolutely unnecessary, as it shows the prop-*

> *erty to have been in the custody of a receiver appointed by the Supreme Court of the State of New York, and there is nothing in the record to show that the state court receiver is not an entirely proper and competent person to preserve the assets. What could the federal receiver do under such circumstances? He has not title to any property. He is a mere custodian. He could not take the assets from the state court receiver. The bankruptcy court could not make any such order, and the assets could only be taken from the state court receiver by an application to the state court itself.* Furthermore, this appointment of receivers as of course is a great injustice to the bankrupt, in the event that the petition is not followed by adjudication; and it is wasteful and an unnecessary expense to the estate in the event that there is an adjudication. The papers on this application are wholly inadequate. The order is reversed, with instructions to vacate the receivership.' " (Italics supplied.)

In the instant case a participant of a mortgage pool, in the possession of the Secretary of Banking, is afforded all the freedom his interest requires. The Secretary of Banking is required to file an account in a State Court and if he unduly delayed, the Court could have cited him to show cause why an account should not be filed. After the account were filed any dissatisfied person could file exceptions, which would be adjudicated by the Court and which, in cases of mismanagement, could sur-charge the Secretary and his surety. No greater security can be procured in administration by Federal Receivers.

But if it were necessary to appoint a Federal receiver because of the maladministration of the Secretary of Banking, all that the Federal receiver could do would be to file a petition in a state court for the appointment of substi-

tuted trustees for the pools because that would be in conformity with the procedure set up in the Act of Congress, 36 Stats. 1104; U. S. C. page 876 which provides:

> "Whenever in any cause pending in any court in the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. . . . "

Under the Department of Banking Code of 1933, the Secretary of Banking, who was in possession, was required to file an account, and, if no party in interest had already done so, to apply for a substituted trustee (Section 904, Appendix page 60). This then is all that the Federal Receivers could do. They could not indefinitely operate the pool either under State or Federal Law.

We respectfully submit that the Federal Court cannot appoint a person whose duties, in either aspect, would be those of a trustee or a person who was to hold more or less permanently and administer property, and call him a receiver. In such a case it may well be said: "The voice is Jacob's voice, but the hands are the hands of Essau".

II. A Bill in Equity Naming the Secretary of Banking for the Commonwealth of Pennsylvania, a Defendant, and Which Has for Its Purpose the Substitution for the Secretary of Banking as State Receiver, of Federal Receivers, Is a Suit Against the State of Pennsylvania, and contrary to the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment to the Constitution of the United States, which was adopted to render inoperative Section 2, Article 3, of the Constitution, as interpreted by this Court's decision in CHISHOLM v. GEORGIA, 2 Dallas (U. S.) 419 (1793), was ratified by the Legislatures of three-fourths of the States, on the 8th of January, 1798, and reads as follows:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Article 4, Sec. 1, of the Constitution of the State of Pennsylvania, reads as follows:

> "The Executive Department of this Commonwealth shall consist of a Governor, Lieutenant Governor, Secretary of the Commonwealth, Attorney General, Auditor General, State Treasurer, Secretary of Internal Affairs and a Superintendent of Public Instruction."

Article 2 of the "Administrative Code of 1929", April 9, 1929, P. L. 177, provides as follows:

> "The Executive and Administrative work of this Commonwealth shall be performed by the Executive

Department consisting of the Governor, etc. etc. etc. (and) by the following Administrative Departments: . . . Department of Banking."

Are the instant cases suits by citizens of a foreign state against the State of Pennsylvania?

The defendant in each case is HONORABLE WILLIAM D. GORDON, Secretary of Banking, and ROBERT G. FUNKHOUSER, Special Deputy in Possession of Chester County Trust Company. Only three things are possible:

1. That it is a suit against the State of Pennsylvania with an administrative officer as nominal defendant.

2. That is a suit against William D. Gordon and Robert G. Funkhouser, individually.

3. That it is a suit against William D. Gordon as Receiver in possession of the business and property of the Chester County Trust Company, in accordance with Section 601, Banking Code of 1933 of Pennsylvania.

The second of these possibilities needs no argument, for as an individual citizen, William D. Gordon would have no rights and/or powers over the Chester County Trust Company assets. Therefore, he is either in possession as an executive and/or administrative officer of the State, or as a Receiver appointed by State Law and subject to the authority of the Court of Common Pleas of Chester County.

The Secretary is appointed by the Governor of the State as a member of his Cabinet, and is the agent of the people of the State for the supervision and control, through the Governor, of banking institutions. His salary is fixed; he receives no commissions; and/or fees; and has no interest whatsoever of a personal nature in either going or

closed banking institutions. He is a vehicle for expressing, in an executive and administrative manner, the will of the people of the State of Pennsylvania, with regards to the administration and liquidation of closed banks. A suit against him in this capacity is a suit against the people of the State of Pennsylvania or the State of Pennsylvania, and cannot be maintained without the State's consent.

In Ex Parte Ayres, 123 U. S. 443; 31 L. ed. 216 (1887), a bill was filed by certain aliens against the Attorney General and the Auditor General of Virginia to restrain them from instituting certain suits under a state statute. It was held that this was a suit against the State of Virginia, even though the state was not named as a party. The court said (U. S. 505; L. ed. 229):

> "To secure the manifest purpose of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a state by name, but those also against its officers, agents, and representatives, where the state, though not named as such, is nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates."

The Court said in Fitts v. McGhee, 172 U. S. 516; 43 L. ed. 535 (1899), (U. S. 629; L. ed. 541):

> "As a state can act by its officers, an order restraining those officers . . . is one which restrains the state itself, and the suit is consequently as much against the state as if the state were named as a party defendant on the record."

The decree of the Court below in the present case interferes with one of the state's principal officers in the performance of his public duty imposed by an admittedly constitutional statute. The state is in effect being interfered with in its public duties just as much as if named a party to the suit.

In MURRAY v. WILSON DISTILLING Co., 213 U. S. 151; 53 L. ed. 742 (1909), this Court held that the United States District Court of South Carolina could not entertain a bill in equity for the appointment of a receiver to take over funds in the hands of the Liquor Commission, appointed by the state under an act of assembly for the purpose of liquidating the indebtedness of various liquor dispensers of the state. It was argued that the suit was against the Commission and not against the state. The court said:

> "The State is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is therefore substantially within the prohibition of the 11th Amendment. . . . An action will not lie in a case where a State officer is merely a nominal defendant and the State is the real party in interest."

In LANKFORD v. PLATTE IRON WORKS Co., 235 U. S. 460; 59 L. Ed. 316 (1915), suit was instituted against the members of the State Banking Board of Oklahoma to compel them to collect and to make payment to the petitioners of their share of the State Bank Guaranty Fund. It was held that the suit in effect was against the state and that therefore the court had no jurisdiction.

In the present case, likewise, the funds which it is sought to obtain, are trust funds in the hands of the State for administration.

With equal effect we might refer to the opinion of the Trial Judge in UTAH CONSTRUCTION COMPANY v. STATE HIGHWAY COMMISSION, 16 F. (2d) 322 (D. Wyo. 1926), where he states, at page 325:

> "In Hopkins v. College, 221 U. S. 636, at page 642, 31 S. Ct. 654, 656, 5 L. ed. 890, 35 L. R. A. (U. S.) 243, the Court says:
>
> "'And lacking other form to sustain, the Eleventh Amendment has been held to apply not only where the State is actually named as a party defendant, on the record, but where the proceeding, though nominally against an officer, is really against the State, or is one to which it is an indispensable party. No suit, therefore, can be maintained against a public officer which calls to compel him to exercise the state's power of taxation or to pay out its money in its possession on the State's obligation, or to execute a contract, or to do any affirmative act which affects the State's political or property rights.'"

In the UTAH CONSTRUCTION COMPANY case the State of Wyoming, by constitutional amendment, was authorized to go into the road-building business, and in proceeding to carry out this new foundation, it created the commission which was to act as its agency as to that matter. The Court held that a suit against the commission was, in effect, a suit against the State of Wyoming.

So, too, in the instant cases, the Commonwealth of Pennsylvania, under its general powers to legislate and control for the good and welfare of its general populace, has provided for the supervision and control of its quasi-public institutions through its own offices. The Legislature has provided that these functions, which are within the State's powers, are to be carried out through its designated

agencies, the Department of Banking and its Administrative Head, the Secretary of Banking. In these cases the defendants are only parties because of their official positions and, upon ceasing to hold office, their successors would be substituted as representatives of their Government. The defendants are not charged with any personal act detrimental to the plaintiffs, nor are they charged with acting under an unconstitutional statute. The charges against them, however, are against them as the representatives of the Commonwealth of Pennsylvania, in the exercise of its power to control its quasi-public institutions.

III. The Secretary of Banking, When Sued in His Official Capacity as a Receiver of a Closed State Bank, Is Not a Citizen of That State Within the Meaning of Section 24 of the Judicial Code, as Amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A., Sec. 41 (1).

Article 3, Section 2, of the Federal Constitution reads:

> "The judicial power shall extend in all cases in law or equity arising under this Constitution . . . between *citizens of different states.*"

The Jurisdiction of the District Courts has been limited to suits between citizens of different states in Section 24 of the Judicial Code, as amended by the Act of March 3, 1911, c. 231, 36 Stat. 1091, 28 U. S. C. A. Sec. 41 (1).

Numerous cases have decided that a suit by one citizen against an executive or administrative officer of another State, or against the State, does not create a diversity of citizenship, because an executive State officer sued in his official capacity is not a citizen of any State within the meaning of the diversity of citizenship doctrine.

In Westbrook v. Director General of Railroads, 263 Fed. 211 (1920), it was held:

"When sued officially, neither the officer nor the Government is a citizen of any State. No jurisdiction on account of diverse citizenship exists in these cases."

In HERTZ v. KNUDSON, 6 F. (2d) 812 (C. C. A. 8, 1925), the Court held that where, under statutory authority a department of the State Government takes possession of an insurance company, the department may not maintain suit in the Federal Court because a suit by the Department or by an officer in its behalf, is a suit by the State and that a Federal District Court is without jurisdiction in such matters.

It is significant that Section 601 of the Department of Banking Code of 1933 provides that:

"Whenever the Department takes possession . . . the Secretary shall by operation of law, simultaneously take over such possession from the Department and become receiver . . ."

The comments of the Attorney General of Pennsylvania upon this section, which appear in Pennsylvania Banking and Building and Loan Codes (1933) at page 38, are:

"1. . . . It seems necessary under the general plan of drafting all legislation now in force in this Commonwealth, under which powers and duties are respectively granted to and imposed upon Departments, rather than upon the officers in charge of such Departments. Consequently, the power to take possession is vested in the Department. However, *it is difficult to conceive of the Department as a receiver. It is, therefore, provided, that when the Department takes possession, the Secretary shall, by operation of law, simultaneously take over possession and become receiver.*"

We must mark the fact that the Department of Banking Code of 1933 was drafted by the Attorney General, and it is evident from his remarks that the only purpose of the designation of the Secretary of Banking as a receiver is for purposes of personifying the administrative offices of the Commonwealth to which the liquidation of banks and trust companies is entrusted.

In UTAH CONSTRUCTION COMPANY v. STATE HIGHWAY COMMISSION (*supra*), the Court specifically stated that quite aside from any question of the Eleventh Amendment, the District Court had no jurisdiction, inasmuch as the suit was by a citizen of one State against an administrative agency of another State.

We submit that any action brought against the Secretary of Banking, by virtue of his position, is an action not against him but against the Department and the Commonwealth he represents and that such an action, therefore, may not be brought without its consent, or, even if brought with its consent, may not be brought in the District Court.

CONCLUSION.

These cases, GORDON, SECRETARY OF BANKING v. OMINSKY et al, October Term, 1934, No. 395, and COMMONWEALTH OF PENNSYLVANIA v. JOHN G. WILLIAMS, et al, October Term, 1934, No. 394, are the only decisions of United States Circuit Court of Appeals refusing to give effect to State Laws governing the method of liquidating quasi-public corporations. All of these cases were decided at about the same time. In the two last mentioned argument was heard by this Court on January 14, 1935, and in an opinion handed down on February 4, 1935, it was held that the District

Court abused its discretion in declining to relinquish possession. They involve the appointment of receivers for Pennsylvania building and loan associations.

These decisions reflect a complete change in the attitude of the Circuit Court of Appeals for the Third Circuit on this important subject. In the earlier cases, LYON v. MCKEEFREY, 171 Fed. 384 (1909), and O'NEIL v. WELCH, 245 Fed. 261 (1917), this same court gave strong expression to its belief that Federal Courts should support State systems for the organization, regulation, supervision and liquidation of quasi-public corporations. The former case dealt with a bank—the latter with an insurance company.

In the following cases, circuit courts of appeal reviewed the exercise of discretion by district courts in appointing receivers for quasi-public corporations or for certain assets of such corporations, and sustained the State authorities:

MITCHELL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Petition for Certiorari to U. S. Supreme Court denied, 283 U. S. 864 (1931).

BANK OF BAY BISCAYNE v. HANKINS, 42 F. (2d) 209 (1930) C. C. A., Fifth Circuit.

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) 286 (1931) C. C. A., Fifth Circuit. Petition for Certiorari to U. S. Supreme Court denied. 285 U. S. 559 (1932).

In the following cases Federal receiverships were set aside even though the bill in equity had been filed before the state officer took possession of the quasi-public corporation's property and assets:

AMOS v. TRUST CO. OF FLORIDA, 54 F. (2d) (1931) C. C. A., Fifth Circuit. Certiorari refused. 285 U. S. 559.

MITCHEL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Certiorari refused, 283 U. S. 864.

In the following cases the Federal receivers were required to turn over to the state authorities the assets of a quasi-public corporation at the instance of the proper state officer. In all of them the district court was reversed.

LYON v. MCKEEFREY, 171 Fed. 384 (1909) C. C. A., Third Circuit, Judge Gray.

MITCHEL v. LAY, 48 F. (2d) 79 (1930) C. C. A., Ninth Circuit. Certiorari refused, 283 U. S. 864.

O'NEIL v. WELCH, 245 Fed. 261 (1917), C. C. A., Third Circuit.

LEE v. EDMUNDS, 66 F. (2d) 122 (1933) C. C. A., Fifth Circuit.

However, in the two cases last cited the Federal receivership was junior to a state receivership.

In WM. D. GORDON v. JOHN G. WILLIAMS et al., No. 394, October Term, 1934, decided by this court February 4, 1935, it was held that the District Court abused its discretion in refusing to relinquish possession of the assets of a quasi-public institution even though the bill in equity had been filed before the state officer purported to take possession under the Building & Loan Code. If, under such facts, it is an abuse of discretion to refuse to relinquish possession it is certainly an abuse of discretion for the court to have assumed jurisdiction in the instant case where the

state official had been in possession for a period exceeding six months.

Thus we find support for our position in the expressions of the Circuit Courts of Appeal of the Second, Third, Fifth, Sixth and Ninth Circuits.

Except for the present cases and the two other cases decided at practically the same time, there are no Circuit Court of Appeals decisions to the contrary in any circuit.

On principle we submit that the decree of the Circuit Court of Appeals should be reversed.

Its decision is in direct conflict with the decisions of other circuits the review of which has been refused by this Court. Its decision is opposed to the public policy of the Commonwealth of Pennsylvania; and its decision is opposed to the policy of this Court as enunciated in the case of Wm. D. Gordon v. John G. Williams et al.

The decision of the Circuit Court attempts to deprive the Commonwealth of Pennsylvania of its sole control of property exercised under State law through its authorized administrative officer and under the supervision of its courts and to seat nominees of the Federal Court in positions reserved exclusively by state law for state officers.

The Circuit Court of Appeals has wrongfully sustained the effort of the district court to frustrate the state's settled policy in regulating and liquidating quasi-public corporations and to interfere with a state officer in the discharge of his statutory duty.

Finally, notwithstanding the fact that the Secretary of Banking was functioning properly under Pennsylvania law the appointing Judge abused his discretion and violated fundamental principles of equity by appointing trustees, under the guise of receivers, later designated "temporary receivers," without allowing an answer to be filed,

without ascertaining the facts, without giving sufficient notice to the parties in interest, and upon mere averments which were plainly insufficient to justify the appointment of receivers.

For these reasons, we believe that the decree of the court below should be reversed.

Respectfully submitted,

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Appendix.

PERTINENT PARTS OF PENNSYLVANIA BANKING LAWS

I. Act of May 13, 1876, P. L. 161.

Section 27. That the auditor general after having notified such corporation that it has committed an act of insolvency, shall forthwith, with the concurrence of the governor, appoint a special agent at a compensation not exceeding ten dollars per day and necessary traveling expenses, who shall make immediate inquiry into the truth of such information, and make report thereon to the auditor general; and if the said special agent shall report to the satisfaction of the auditor general that such corporation has suspended payment of its liabilities he shall forthwith apply to the court of common pleas of the proper county, if in session, or if in vacation to the president judge of the district in which such corporation is located, to appoint a suitable receiver, who shall take immediate possession of the books, records, money, bills, bonds, notes, other evidence of indebtedness, and all the property of such corporation of every description, and hold the same for the creditors of the said corporation.

Section 29. That if any corporation under this act against which the auditor general shall have instituted proceedings on account of any supposed act of insolvency as prescribed in this act, such corporation may apply to any court of competent jurisdiction for an injunction on said auditor general to suspend all further proceedings against such corporation for insolvency, and such court after citing

the auditor general to appear and show cause why such writ should not be granted, the said court shall proceed to inquire if such corporation has actually suspended payment of its liabilities and continues such suspension, and for this purpose such court may direct an issue, if required by either party; and if after such inquiry such court shall discover such corporation has not suspended and does not continue to suspend payment of its liabilities, shall make an order enjoining the auditor general from all further proceedings against such corporation on account of the supposed act of insolvency on which such proceedings were instituted, and thereupon all the property and assets of such corporation shall be restored to it.

II. Act of February 11, 1895, P. L. 4.

Section 9. If from any examination of the papers, books and affairs of any corporation, with or without capital, the Commissioner of Banking shall have reason at any time to conclude that such corporation is in an unsound and unsafe condition to do business, or that its business or manner of conducting the same is injurious and contrary to the interests of the public, the Commissioner of Banking shall forthwith communicate the facts to the Attorney General who shall forthwith make application to the court of common pleas of the county of Dauphin, or to a law judge thereof, for the appointment of a receiver to take charge of such corporation's property and wind up its business. Such receiver shall proceed and wind up the business and affairs of said corporation under and subject to the orders of the court of common pleas aforesaid. Such court shall also approve the amount and security of the bond to be given by said receiver for the faithful performance of his duties:

Provided, however, That if the Commissioner of Banking shall at any time deem it necessary for the immediate protection of the depositors and other creditors of any such corporation, he may, after hearing before the Attorney General of the Commonwealth, (of which hearing the said corporation shall have notice,) appoint some suitable person as temporary receiver who shall first give to the Commonwealth a good and sufficient bond with two sureties to be approved by said Commissioner, conditioned for faithful performance of duty, and shall forthwith take possession of said corporation's property and business and retain possession thereof pending like proceedings, as aforesaid, which shall be forthwith instituted in the court of common pleas of Dauphin county, at which time the compensation of said receiver shall be fixed by said court. And said Commissioner of Banking, after having so appointed said temporary receiver, shall, (if he deems it safe and to the best for all interests concerned,) have power at any time to withdraw said temporary receiver and cancel his appointment and surrender possession of said corporation and its property to said corporation without further proceedings or order. Whenever a corporation which shall deny that there is a good reason for the institution of either of the proceedings, as aforesaid, or that its business should be closed, or that it should be dissolved, it shall forthwith file its answer in said court of common pleas of the county of Dauphin, or make application to said court, or the law judge thereof, and ask for an order to enjoin further proceedings in the premises; whereupon the said court, or law judge thereof, after hearing the allegations and proofs of the respective parties, shall make such order in the matter as the interest of the parties and that of the public may require.

III. The Banking Act of 1923, Act of June 15, 1923, P. L. 809, as Amended by Act of May 5, 1927, P. L. 762.

Section 22. *Certificate of Taking Possession.*—When the Secretary shall have duly taken possession of the business and property of a corporation or person as provided in section twenty-one of this act, he shall forthwith make, under his hand and official seal, a certificate setting forth that he has so taken possession, and shall file such certificate in his office, and cause a certified copy thereof to be filed in the office of the prothonotary, who shall index the same in the judgment index under the name of the corporation or person as defendant and the name of the Secretary as plaintiff.

From and after the filing of such certified copy in the office of the prothonotary, the Secretary shall supersede any receiver previously appointed by any court for, or any assignee or trustee for creditors appointed by, such corporation or person.

* * * * * * *

Section 23. *Injunction to Restrain Secretary.*—Whenever the Secretary takes possession of the property and business of any corporation or person, such corporation or person may, at any time within ten days, apply to the court for an order requiring the Secretary to show cause why he should not be enjoined for continuing such possession. * * *

Section 29. *Status and Powers of Secretary as Receiver.*—Except as herein otherwise provided, the Secretary shall, when he has taken possession of the business and property of the corporation or person, have all the rights,

powers, and duties of a receiver appointed by any court of equity in this Commonwealth; and he shall be vested, in his official capacity, with all the rights, powers, and duties of such corporation or person and with all the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, whether or not the property of such corporation or person, including debts due, liens, or securities therefor, and rights of action or redemption, are held in the name of such corporation or person, or in the name of some other corporation or person, but actually the property of the corporation or person of which, or of whom, the Secretary has possession.

He shall be the representative of the creditors of the corporation or person, and entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or incumbrance, which could have been avoided by the creditors or any of them, or by which it is attempted to give any creditor unlawful preference over another.

He may, with leave of court obtained on petition after notice to all creditors of whom he has knowledge, surrender to the corporation or person any assets, including choses in action, whether the subject of pending proceedings or not, which are burdensome and of no advantage to creditors.

IV. Pertinent Parts of Department of Banking Code, Act of May 15, 1933, P. L. 565 (effective July 3, 1933).

1. General Provisions.

Section 2. *Definitions—A.* The following terms shall be construed in this act to have the following meanings,

except in those instances where the context clearly indicates otherwise:

* * * * * *

"Court"—the court of common pleas of the county in which the corporation or person has its principal or only place of business in this Commonwealth; or, where an institution of which the Secretary is receiver is concerned, the particular court in which the certificate of possession, as defined later in this act, is filed.

"Prothonotary"—the prothonotary of such court.

Section 601. *Taking Over Possession by Secretary as Receiver.*—Whenever the department takes possession of the business and property of an institution, the Secretary shall, by operation of law, simultaneously take over such possession from the department and become receiver of such institution, subject to the provisions of this act. His official title, when thus in possession of the business and property of an institution, shall be receiver of such institution.

Section 604. *Certificates of Possession; Filing.*—A. The Secretary, upon taking possession of the business and property of an institution as receiver, shall forthwith, under the seal of the Department, prepare in duplicate a certificate, to be known as the certificate of possession, setting forth that he has become receiver of the institution. It shall state the name of the deputy receiver whom the Secretary, pursuant to the provisions of this act, appoints to take charge of the affairs of the institution, and shall set forth the duties which he delegates to such deputy receiver. If the Secretary does not appoint a deputy receiver prior to the date of the filing of the certificate of possession, or if he appoints a new deputy receiver or an addi-

tional one, or if he adds to the duties of the deputy receiver, he shall prepare, in duplicate, and file a supplement to the certificate of possession.

B. The Secretary shall file the original certificate of possession and the original of any supplement thereto in his office in Harrisburg, and the duplicate certificate of possession and the duplicate of any supplement thereto in the office of the prothonotary. The certificate of possession filed in the prothonotary's office, and any supplement thereto, shall be listed in the judgment index in the name of the institution as defendant and of the Secretary as plaintiff.

C. In addition the Secretary shall, as soon as possible, file a certified copy of the certificate of possession, and of any supplement thereto, in the office of the recorder of deeds in each county in the Commonwealth, or with the proper official in any other state or country, in which any real property shall be situated which belongs to the institution or title to which is in its name, or upon which there is a mortgage or other lien which belongs to the instituton or title to which is in its name. Such copy shall be recorded in the current deed book, and shall be indexed in the grantors' index in the name of the institution and in the grantees' index in the name of the Secretary, or it shall be filed, indexed, or registered by whatever other method is provided by the law of the particular county, state, or country in which such real property is located.

Section 605. *Injunction to Restrain Secretary.*—Any institution of whose business or property the Secretary has taken possession as receiver, may, at any time within ten days after the Secretary has become receiver, apply

to the court for an order requiring the Secretary to show cause why he should not be enjoined from continuing as receiver. Service may be made in such action by serving the Secretary personally, or by leaving a copy with the deputy in charge of his office in the Department, or by serving the deputy receiver appointed by the Secretary to manage the affairs of such institution. The court shall, after a hearing upon the merits, either dismiss the application or order the Secretary to surrender to the institution possession of its business and property, but no such injunction shall issue where the Secretary has been appointed receiver by action of a court of competent jurisdiction, or by action of the institution itself, in accordance with the provisions of this act.

Section 606. *Power of Courts to Appoint Receivers.*—No court shall appoint anyone by the Secretary as receiver of an institution. Whenever any court, at the instance of a depositor, shareholder, or other person entitled by law to institute such proceedings, shall determine that a receiver shall be appointed, for any reason whatsoever, it shall appoint the Secretary as such receiver.

When thus appointed receiver by a court, the Secretary shall serve in the same manner and with the same limitations, and he shall have the same rights, powers, and duties, as when he becomes receiver by operation of law and without appointment by any court. No court shall impose upon the Secretary as receiver any duties or restrictions which are in conflict with the provisions of this act.

Section 701. *Status of Secretary as Receiver.*—Except as otherwise provided in this act, the Secretary, when he has taken possession of the business and property of an

institution, shall be responsible to the court in which the certificate of possession is filed, and not to any other court. His rights, powers, and duties shall be those of a general receiver appointed by any court of equity in this Commonwealth, except as such rights, powers, and duties are increased or limited by the provisions of this act. He shall be vested, in his official capacity, with all the rights, powers, and duties of such institution; with the title or the right to possession of all property to which the institution has title or the right to possession, including debts due, and liens and other security therefor; and with the institution's rights of action or redemption. This shall be so whether such property and debts due, such liens or other security therefor, or such rights of action or redemption, are held in the name of such institution, or in the name of some other corporation or person. He shall have power to execute in his name, as receiver, any instrument incident to the exercise of any power granted to or any duty imposed upon him as receiver of such institution.

The Secretary shall be the representative of the creditors of the institution and shall be entitled, as such, to have vacated and set aside, for the benefit of the creditors, any judgment, execution, attachment, sequestration, payment, pledge, assignment, transfer, conveyance, or encumbrance, which could have been avoided by any of the creditors, or by which one creditor is given an unlawful preference over another.

Section 709. *Power of Court to Make and Enforce Orders.*—The court in which the certificate of possession is filed shall sit as a court of equity. It shall have the power, upon petition of the Secretary, to make and enforce any appropriate order to enable him, with the utmost dis-

patch, to discharge his duties in connection with the business and property of any institution of which he has taken possession as receiver, pursuant to the provisions of this act.

The court shall grant to the party against whom the order is sought the right to appear, within ten days after notice is given, to show cause why the order should not be made. The court shall have the power, at the end of the ten-day period, ex parte if the other party does not appear to show cause, or upon the merits, if the party does appear, to issue the aforementioned order.

Note: The Department of Banking Code also provides for the sale of certain property, in some situations with leave of court and in some without leave, for compromises with leave of court, for accounting to the court and for distribution under order of court.

Section 802. *Secretary in Possession of Trust Department.*—B. The Secretary, when in possession of an institution as receiver, shall have all the rights, powers and duties which such institution had in its fiduciary capacity . . . and shall have the power to administer such estates.

2. MORTGAGE POOL PROVISIONS.

ARTICLE IX.

Secretary in Possession of a Mortgage or Security Pool or of an Asset in Which Undivided Interests Are Held.

Section 901. *Mortgage and Security Pools and Participations; Accounts.*—Whenever the Secretary shall have filed a supplement to the certificate of possession, setting forth his determination to liquidate the affairs of an in-

stitution of which he is in possession as receiver, he shall, as soon as it may be convenient, file, in the court in which the certificate of possession shall have been filed, an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by such institution, or as to any mortgage, security, or other asset, in which undivided interests shall have been created by the institution, regardless of whether certificates of participation in such mortgage or securities pool, or in such mortgage, security, or other asset shall have been actually issued by the institution, and regardless of whether the relation of the institution to the owners of the undivided interests in such mortgage or securities pool, or in any such mortgage, security, or other asset, is technically that of a trustee.

A mortgage or securities pool shall be regarded as having been operated by the institution, regardless of whether any or all of the mortgages, securities, or other assets in such pool shall be held in the name of the institution or in the name of the nominee of the institution. Where undivided interests have been created in any mortgage, security, or other asset by any corporation or person holding such mortgage, security, or other asset as nominee of the institution, such undivided interests shall be regarded as having been created by the institution.

The prothonotary shall not be under any duty to recopy or otherwise record any such account filed by the Secretary. He shall make no charge except the regular fee for filing such or similar papers.

Section 902. *Transfer of Pools and Participations Without Filing an Account.*—If all the corporations or persons who are the owners of all the undivided interests in

any mortgage or securities pool, or in any mortgage, security, or other asset in which the institution shall have created undivided interests, are sui juris, and if they shall agree to the amount asserted by the Secretary to be due him as receiver for services rendered by the institution or by him, and for expenses incurred by either, and if they shall authorize the Secretary to transfer any such mortgage or securities pool, or any such mortgage, security, or other asset to them, or to a substituted fiduciary or to any other corporation or person agreed upon by them, and if they shall execute proper instruments releasing the Secretary and the institution from any further liability to them, the Secretary may transfer to such substituted fiduciary or to such corporation or person, without filing an account, all the mortgages, securities, or other assets comprising such mortgage or securities pool or the mortgage, security, or other asset in which undivided interests have been created. In any case where the institution, as fiduciary of an estate, is the owner on behalf of such estate of any undivided interest in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and no substituted fiduciary has been appointed for such estate, the Secretary shall not transfer such mortgage or securities pool, or such mortgage, security, or other asset in which undivided interests were created by the institution, unless he shall also be authorized to make such transfer by all corporations or persons having an interest in the estate of which the institution was fiduciary, except that where substituted fiduciaries have not been appointed for unborn beneficiaries of the estate or for other beneficiaries who are not sui juris, the Secretary shall not be required to obtain such authority from anyone in behalf of such unborn beneficiaries or other persons who are not sui juris.

Section 903. *Notice of Filing Account.—A.* Upon filing an account as to any mortgages, securities, or other assets comprising any mortgage or securities pool operated by an institution of which he is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the Secretary shall give notice thereof, in so far as it may be practicable, to all corporations or persons who are the owners of the undivided interests in any such mortgage or securities pool, or in any such mortgage, security, or other asset, and, in any case where the institution as fiduciary of an estate, is the owner on behalf of such estate of any such undivided interest, then to all corporations or persons having an interest in such estate, except that no such notice need be given to anyone on behalf of unborn beneficiaries of such estate or other beneficiaries who are not sui juris, where no substituted fiduciary has been appointed for such beneficiaries. Such notice shall be given to the corporations or persons entitled thereto under this section, at their addresses as they appear on the books or other records of the institution, or, if the address of any such corporation or person does not appear thereon, then at the last known address of such corporation or person.

B. Such notice shall state the time and place of the audit of such account, and, except where an application for a substituted fiduciary shall have been made by any other method authorized by this act, it shall also state the intention of the Secretary to apply for a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, and the time and place of any hearing upon such application which may be fixed by the court.

Section 904. *Appointment of Substituted Fiduciary; Transfer of Pools or Participations upon Order of Court.* —*A.* After the filing by the Secretary of a supplement to the certificate of possession, setting forth his determination to liquidate the business and property of an institution, but either before or after the filing of an account by him as to any mortgages, securities, or other assets comprising any mortgage or securities pool, operated by such institution, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, the owner of any undivided interest in such mortgage or securities pool, or in such mortgage, security, or other asset, may file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for such mortgage, security, or other asset in which undivided interests were created.

If such petition shall not have been filed by the owner of any such undivided interest within thirty days after the notice by the Secretary of the filing of an account as to such mortgage or security pool, or as to such mortgage, security, or other asset, the Secretary shall file, in the court in which the certificate of possession is filed, a petition for the appointment of a substituted fiduciary for such mortgage or securities pool, or for any such mortgage, security, or other asset in which undivided interests were created by the institution.

Upon the filing of such a petition by the owner of any such undivided interest, or by the Secretary for such mortgage or security pool, or for such mortgage, security, or other asset in which undivided interests were created by the institution, the court shall, upon a day fixed by it, con-

duct a hearing upon such application, after which it shall appoint a substituted fiduciary.

B. The Secretary shall transfer to the substituted fiduciary appointed by the court all such mortgages, securities, or other assets comprising any such mortgage or securities pool, or any such mortgage, security, or other asset in which undivided interests were created, as are in his possession as receiver, and as to which he shall have filed an account. The substituted fiduciary shall take such mortgages, securities, or other assets without liability for the nature or value of the mortgages, securities, or other assets as investments. Such transfer shall be made in accordance with the order of the court, and, in directing such transfer, the court may reserve for future determination any question of surcharge against the institution or the Secretary.

The court may, after petition filed pursuant to the provisions of this section, order the Secretary to make such transfer even prior to filing an account, in which case it may also reserve for future determination any question which may arise upon the audit of the account.

Section 905. *Advances by Secretary to Substituted Fiduciary.*—Whenever the Secretary shall have filed an account as to any such mortgage or securities pool, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, and it shall appear to the court that any sum of cash will be needed by the substituted fiduciary for the protection of the owners of undivided interests in such mortgage or securities pools, or in any such mortgage, security, or other asset, as to which such account shall have been filed, and if it shall appear from the account that the Secretary does not have any cash held by him in connection with such mort-

gage or securities pool, or in connection with any such mortgage, security, or other asset, or if the account discloses that the cash in his hands for that purpose is insufficient for the protection of the owners of the undivided interests in such mortgage or securities pool, or any such mortgage or security, or other asset, or where no account is filed, if the Secretary shall demonstrate these facts to the satisfaction of the court, the court may, upon petition of the Secretary, and in the exercise of its discretion, order the Secretary to advance to the substituted fiduciary, out of the general assets of the institution, such cash as may be necessary for the protection of the owners of such undivided interest. Such order shall provide that the amount of cash so advanced by the Secretary shall be repaid by the substituted fiduciary out of the first moneys realized by such substituted fiduciary on the mortgages, securities, and other assets transferred to him.

Section 906. *Compensation and Expenses.*—The court, in its adjudication of any account filed by the Secretary as to any mortgage or securities pool operated by an institution of which the Secretary is in possession as receiver, or as to any mortgage, security, or other asset in which the institution shall have created undivided interests, shall award to the Secretary such compensation for services rendered and expenses properly incurred by the institution, or by the Secretary, as the court shall deem reasonable and proper under all the circumstances. The order of the court in making any such award to the Secretary shall provide for the payment of such compensation or expenses out of any cash included in the account, or if there be no cash in the account, or if the amount of cash included therein is insufficient to pay the amount awarded to the

Secretary, the order shall provide for the payment of such compensation or expenses out of the first moneys realized by the substituted fiduciary on the mortgages, securities, or other assets so transferred to such substituted fiduciary. All sums received by the Secretary under this section shall become assets of the institution of which he is in possession as receiver.

When the court shall, pursuant to the provisions of this act, order the Secretary to transfer such mortgages, securities, or other assets, prior to the filing of an account, it shall similarly make provision for the payment of the compensation earned, or the expenses incurred, by the institution, or by the Secretary.